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MOTION FILED
JAN 28 1983

No. 81-1180

In the Supreme Court of the United States

OCTOBER TERM, 1982

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL MEMORANDUM AND SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, the Solicitor General, on behalf of petitioner, moves for leave to file the attached supplemental memorandum.

This case concerns the question whether firearms disabilities imposed by 18 U.S.C. 922(g) and (h) apply to a person who pleaded guilty to a qualifying state offense but whose plea was expunged under state law following the completion of probation. Under 18 U.S.C. 922(g) and (h), firearms disabilities are imposed upon anyone who "has been convicted" of a qualifying offense. After the oral argument in this case, the Eighth Circuit in *United States* v. *Woods*, No. 82-1683 (Dec. 27, 1982), decided a closely related question concerning the interpretation of 18 U.S.C. App. 1202(a)(1), which also imposes federal firearms disabilities upon any

person who "has been convicted" of a covered offense. The court held that federal, not state, law determines whether a person "has been convicted" within the meaning of that statute slip op. 4. The court also held (slip op. 6) that where, as in the present case, the defendant entered a voluntary guilty plea to a qualifying state offense, he is a person who "has been convicted" under 18 U.S.C. App. 1202(a)(1). The attached supplemental memorandum is submitted to inform the Court of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

DOJ-1983-01

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of petitioner, files this supplemental memorandum to inform the Court of the decision of the United States Court of Appeals for the Eighth Circuit in *United States* v. *Woods*, No. 82-1683 (Dec. 27, 1982). In that case, the defendant was convicted under 18 U.S.C. App. 1202(a)(1), which makes it a crime for anyone who "has been convicted" of a qualifying state or federal offense knowingly to possess a firearm in commerce or affecting commerce. The defendant had pleaded guilty to a state felony, imposition of sentence for that offense had been suspended, and the defendant was still on probation at the time of the federal trial (slip op. 2-3).

On appeal, the defendant contended that he had not been "convicted" within the meaning of the statute, but the court of appeals rejected that argument. The Eighth Circuit agreed with the First, Fifth, and Ninth Circuits[1] that "federal law determines whether a person is a convicted felon for the purposes of federal firearms statutes" and that "the state law interpretation is not binding on the federal courts" (slip op. 4). The court quoted (*id.* at 3-4) with approval the First Circuit's statement (*United States* v. *Samson*, 533 F.2d 721, 723, cert. denied, 429 U.S. 845 (1976)), that Congress did not intend the meaning of convicted to depend upon the local law's singularities * * *." See also our principal brief at 30-42.

The court of appeals then held (slip op. 6-9) that a voluntary guilty plea constitutes a conviction for purposes of 18 U.S.C. App. 1202(a)(1).[2] The court first noted (slip op. 6) decisions of this Court and lower federal courts stating "that a voluntary guilty plea is a conviction." See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969). The court also relied upon cases holding that a conviction need not be final to subject a person to the restrictions of 18 U.S.C. App. 1202(a)(1) and analogous statutes and that a person can be prosecuted under such statutes even while appeal on his predicate conviction is pending.

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[1]See, *e.g.*, *United States* v. *Benson*, 605 F.2d 1093, 1094 (9th Cir. 1979); *United States* v. *Padia*, 584 F.2d 85 (5th Cir. 1978); *United States* v. *Samson*, 533 F.2d 721, 723 (1st Cir.), cert. denied, 429 U.S. 845 (1976). See also Pet. App. 6a.

[2]The court noted (slip op. 4-6) that the defendant appeared to have been "convicted" under state law but this fact was not determinative. Instead, the critical fact was that the defendant's guilty plea constituted a "conviction" within the meaning of the relevant federal law, *i.e.*, 18 U.S.C. App. 1202(a)(1) (see slip op. 4, 6-9).

The court of appeals was persuaded by the reasoning of various lower court decisions holding that "once guilt has been established whether by plea or by verdict and nothing remains to be done except pass sentence, the defendant has been convicted within the intentment [*sic*] of Congress" in enacting 18 U.S.C. 1202(a)(1) and 18 U.S.C. 922 (slip op. 8). The court specifically referred (*ibid.*) to *United States* v. *Lehmann*, 613 F.2d 130, 135 (5th Cir. 1980), and *Braswell* v. *United States*, 224 F.2d 706 (10th Cir.), cert. denied, 350 U.S. 845 (1955), in which it was held that federal firearms disabilities apply to persons given suspended sentences and placed on probation under Texas law even though in that situation "the conviction is not considered final" under Texas law (*United States* v. *Lehmann, supra*, 613 F.2d at 135). The court also agreed (slip op. 8-9) with the First Circuit's reasoning in *United States* v. *Samson, supra*, 533 F.2d at 722, that the term "convicted" in the federal firearms laws should be given "its normal meaning" since "the consequences of the deprivation [restriction of firearms possession] are relatively slight compared with the gravity of the public interest sought to be protected." The Eighth Circuit stated (slip op. 8-9) that "[t]he normal meaning of the term 'conviction' is that criminal proceeding where guilt is determined, either by verdict or plea."

We believe that *Woods* was correctly decided and that its reasoning should be followed in this case. Here, Kennison pleaded guilty to a qualifying state offense but the court deferred entry of judgment, placed him on probation, and subsequently expunged his criminal record upon completion of probation. Even if the Iowa courts would not regard Kennison as having been "convicted" within the meaning of state law, under *Woods* his guilty plea constituted a conviction for purposes of the federal firearms laws. For the convenience of the Court, we have lodged ten copies of the *Woods* decision with the Clerk of this Court.

For the foregoing reasons and the additional reasons set forth in our previous briefs and during oral argument, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

JANUARY 1983

Docket Sheet

NO. 81-1180-CFX	TITLE	G.R. DICKERSON, Director, Bureau of Alcohol, Tobacco and Firearms, Petitioner v. New Banner Institute, Inc.

DOCKETED	COURT
Dec. 22, 1981	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondent:
Nov. 6, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until December 23, 1981 by Burger, CJ, Nov. 9, 1981.
Dec. 22, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 18, 1982	Order extending time to file a response to the petition until Feb. 19, 1982.
Feb. 22, 1982	Brief for the respondent in opposition filed.
Feb. 22, 1982	Appendix to brief in opposition filed.
Feb. 24, 1982	DISTRIBUTED. 3-19.
Mar. 11, 1982	Reply memorandum for the petitioners filed. (D).
Mar. 22, 1982	Petition GRANTED.

Apr. 1, 1982	Motion of the parties to dispense with printing the joint appendix filed.
Apr. 13, 1982	DISTRIBUTED. 4-16. (Above motion).
Apr. 19, 1982	The motion of the parties to dispense with printing the joint appendix is GRANTED.
May 6, 1982	Order extending time to file the petitioner's brief on the merits until June 5, 1982.
June 7, 1982	Order further extending time to file the petitioner's brief on the merits until June 19, 1982.
June 21, 1982	Brief for the petitioner filed.
July 20, 1982	Order extending time to file the respondent's brief on the merits until Aug. 24, 1982.
Aug. 20, 1982	Order further extending time to file the respondent's brief on the merits until September 3, 1982.
Sept. 3, 1982	Brief for the respondent filed.
Sept. 3, 1982	Brief, amicus curiae, of The National Rifle Association of America filed.
Sept. 15, 1982	CIRCULATED.
Sept. 17, 1982	Motion of National Rifle Association of America for leave to participate in oral argument as amicus curiae filed.

(Over)

81-1180

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 4, 1982	The motion of National Association of America for leave to participate in oral argument as amicus curiae is DENIED.
Nov. 19, 1982	Reply brief for the petitioner filed. (D).
Nov. 29, 1982	ARGUED.
Dec. 16, 1982	Motion of the Solicitor General to file a supplemental brief for the petitioner filed.
Dec. 28, 1982	DISTRIBUTED. 1-7. (Above motion).
Jan. 10, 1983	The motion of the Solicitor General for leave to file a supplemental brief after argument is GRANTED.
Jan 27, 1983	Motion of the Solicitor General for leave to file a second Supplemental brief after argument filed.